United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7310

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DONNA LYNCH, et al,

Plaintiff-Appellee

RUTHANN BIGELOW, GAIL HUNTLEY
and LELAND YOUNG,

Intervening Plaintiffs

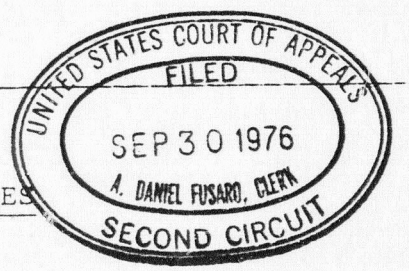
v.

PAUL PHILBROOK, Commissioner
of the Vermont Department
of Social Welfare,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF VERMONT



BRIEF OF PLAINTIFFS-APPELLEES

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C. Are the Vermont Department of Social Welfare regulations governing Vermont's Emergency Assistance Program inconsistent with federal law and thereby invalid under the Supremacy Clause of the United States Constitution?

II. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below

This civil rights action was filed on February 7, 1975 pursuant to 42 U.S.C. § 1983. Jurisdiction was founded on 28 U.S.C. § 1343(3). Each of the plaintiffs in this case are recipients of public assistance under Vermont's program of Aid to Needy Families With Children (ANFC).

Each suffered a personal crisis during 1974 or 1975 which rendered them destitute and in need of emergency assistance for necessities such as food or shelter. In every instance, the crisis was of a type not covered by State welfare regulations governing Vermont's federally authorized program of Emergency Assistance to Needy Families With Children (ANFC-EA). See Stipulation of Agreed Facts, Joint Appendix at 33.

In their Complaints, plaintiffs sought declaratory and injunctive relief on the ground that the eligibility provisions in Vermont's ANFC-EA regulations were more restrictive than those contained in the Social Security Act and federal regulations. As such, plaintiffs claimed that the regulations were invalid under the Supremacy Clause of the United States Constitution. Plaintiffs further maintained that Vermont's Emergency Assistance regulations irrationally discriminated between equally destitute individuals and were therefore violative of the Equal Protection and Due Process Clauses of the United States Constitution. Appendix at 6-13; 23-32.

On February 10, 1975, plaintiff Donna Lynch's request for temporary relief was heard by Judge Albert W. Coffrin. Over defendant's objections, the application was approved and defendant was ordered to pay Emergency Assistance benefits to Ms. Lynch.

Plaintiff moved on March 25, 1975 for certification of a class. Finding that a class was unnecessary to protect all persons similarly situated to the plaintiffs and a failure to satisfy the numerosity requirement of F.R.C.P. Rule 23(a), the District Court denied plaintiffs' motion to proceed as a class action in its Opinion and Order of June 2, 1976.

Plaintiff - intervenor Gail Huntley filed an application for a temporary restraining order and a motion to intervene on April 8, 1975. The issues raised in plaintiff Huntley's Complaint were the same as those raised in the original Complaint filed by plaintiff Lynch. A hearing on plaintiff Huntley's motions was held on April 14, 1975. The motion to intervene was granted immediately following the hearing and a temporary restraining order issued on April 15, 1975.

On July 7, 1975, a hearing was held on plaintiff - intervenor Ruth Bigelow's motion to intervene. Judge Coffrin granted the motion on the condition that if it were determined that plaintiff Bigelow's factual circumstances differed from those of the other plaintiffs in the case, her action could be separated. The legal issues raised in plaintiff Bigelow's Complaint were the same as those in the original Complaint.

Plaintiff - intervenor Leland Young moved to intervene and made application for a temporary restraining order on October 14, 1975. A hearing on these matters

was held on October 20, 1975. Judge Coffrin granted the motion to intervene on the day of the hearing but on October 29, 1975, denied the application for a restraining order.

Following the submission of a Stipulation of Agreed Facts, plaintiffs filed a motion for summary judgment on October 29, 1975. Defendant moved for dismissal of the action and for summary judgment on November 3, 1975.

On June 2, 1976, Judge Coffrin issued an Opinion and Order. Appendix at 59. The Court determined that jurisdiction was properly based on 28 U.S.C. § 1343(3) and concluded that Vermont's Emergency Assistance regulations were inconsistent with federal law and were therefore invalid under the Supremacy Clause of the Constitution.

Following a motion by defendant, the Court, on June 22, 1976, stayed its Order enjoining enforcement of Vermont's ANFC-EA regulations.

Defendant filed a notice of appeal on June 14, 1976.

B. The Facts

1. Statutory Background to the Emergency Assistance Program

Aid to Families with Dependent Children (AFDC), known as Aid to Needy Families with Children (ANFC) in Vermont, is one of several so-called categorical assis-

tance programs established by the Social Security Act of 1935. 42 U.S.C. §§ 601-609. The program is intended to assist needy, dependent children within their own homes and thereby preserve and strengthen the families of eligible recipients. See 42 U.S.C. § 601; Burns v. Alcala, 420 U.S. 575, 581-82 (1975).

As the Supreme Court observed in King v. Smith, 392 U.S. 309, 316-17 (1968), the AFDC program is based on the concept of "cooperative federalism." It is financed largely by the Federal Government and is administered by the states. States need not participate in the program, but those that do participate must submit a "state plan" which comports with the provisions set forth in the Social Security Act and federal regulations. Id. In general, the Act grants the states latitude in matters relating to program benefits and financial eligibility while preserving federal standards relative to "categories" or types of individuals made eligible for assistance. See id. at 318-19, 333; Townsend v. Swank, 404 U.S. 282, 286 (1971); Carleson v. Remillard, 406 U.S. 598 (1972); Philbrook v. Glodgett, 421 U.S. 707, 719 (1975).

There are several identifiable components of the overall AFDC program. The basic program provides assistance to needy children who are "deprived of parental support or care by reason of the death, continued absence

from the home, or physical or mental incapacity of a parent...." 42 U.S.C. § 606(a). In the years since 1935, Congress has steadily expanded the coverage of the program in order to include particular groups such as needy children between the ages of 18-20 who are in school, 42 U.S.C. § 606(a)(2)(B) and children of unemployed fathers, 42 U.S.C. § 607(a), whom Congress felt required the Act's protections and benefits.

With each extension of coverage, states have been given the option of whether or not they wish to participate in the program expansion. Townsend v. Swank, 404 U.S. at 288-91. States which choose to extend their coverage and thereby receive additional federal funds are required to comply with federal standards governing the new component of the program. See generally Townsend v. Swank, supra; Philbrook v. Glodgett, supra.

One of the expansions in the AFDC program took place in 1968 when Congress, through P.L. 90-248[1/], provided 50% federal matching funds for those states choosing to establish programs of "emergency assistance to needy families with children." 42 U.S.C. §§ 603(a)(5); 606(e). As with other expansions of AFDC coverage,

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1/ Known as the Social Security Amendments of 1967. See 1967 U. S. Code Cong. and Admin. News 2834.

inclusion of the Emergency Assistance component to a state AFDC plan was optional with each state. 1967 U.S. Code Cong. and Admin. News 3003. Those states which opted to participate were required to submit a state plan in accordance with the provisions of the Social Security Act and federal regulations. 42 U.S.C. §§ 602; 606(e); 45 C.F.R. § 233.120. Appendix at 53. Vermont has chosen to participate in this component of AFDC.

The federal statute creating AFDC-EA, 42 U.S.C. § 606(e), and its implementing federal regulation, 45 C.F.R. 233.120, establish eligibility criteria for receipt of assistance under the program. They provide that a child, and any other member of the household in which he is living, is eligible for AFDC-EA for thirty days in any twelve month period if the child is living in the home of one of the relatives specified in the Act, is without resources available to meet his needs, and if the assistance is necessary to avoid destitution or to provide living arrangements in a home for the child. The destitution or lack of living arrangements cannot have arisen because the child or a relative refused without good cause to accept employment or training for employment.

The Vermont State Plan for ANFC-EA repeats the above federal eligibility standards, but then states that "(e)ligibility conditions. . . are specified in the Family Services Policy Manual (Sections 2600-2603)." Appendix at 51. Sections 2600-2603 of the Family Services Policy Manual, now referred to as the Welfare Assistance Manual (WAM), contain the eligibility standards for Vermont's General Assistance program. Appendix at 55-57. This wholly State funded program provides financial relief to needy individuals who cannot qualify for assistance under one of the federal categorical welfare programs. Nevertheless, the General Assistance eligibility standards have been incorporated by reference into the State's ANFC-EA plan as eligibility standards for that program as well.

WAM section 2600(A)(1) provides that except as allowed in section 2602 for specified catastrophic situations, General Assistance is available only to those individuals who have received net income which is below the State's ANFC payment level during the 30 day period immediately preceding the date of application for General Assistance. This rule, known as the "30 day rule", automatically excludes any ANFC recipient from receiving Emergency Assistance irrespective of whether or not federal Emergency Assistance eligibility

standards are met and no matter how dire the need unless, pursuant to WAM § 2602, the emergency is caused by the death of a spouse or a minor dependent child; a court ordered eviction; a natural disaster or an emergency medical need.[2/]

The practical effect of the Vermont State Plan for ANFC-EA is that individuals, such as plaintiffs, who qualify for Emergency Assistance under federal eligibility standards may nonetheless be found ineligible because they fail to meet the more restrictive State standards.

The State of Vermont claims federal reimbursement for persons who meet federal Emergency Assistance standards and are fortunate enough to receive General Assistance because they also meet the more restrictive eligibility criteria of the latter program.

2. Donna Lynch

Plaintiff Donna Lynch lives in Burlington, Vermont, with her three year old son. She has been a regular ANFC recipient since March of 1973 and also receives disability benefits under the Supplemental

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2/ WAM § 2602 was amended subsequent to the filing of the original Stipulation of Facts. The amendment eliminated one of the grounds for receipt of Emergency Assistance. See Supplemental Stipulation of Agreed Facts, Appendix at 54; see also Appendix at 48; 57.

Security Income (SSI) program. Her total income from these two welfare programs is approximately $305 per month and she has no other source of income.

In early February, 1975, plaintiff Lynch received and cashed her regular ANFC check in the amount of $61.00 and her SSI check in the amount of $202.00. On February 3, 1975, the cash proceeds from these two checks (except for $30.00 which had already been spent) were stolen from plaintiff Lynch's purse. The police were summoned and conducted an investigation but none of the stolen money was recovered.

Because of the theft, plaintiff Lynch on February 5, 1975, applied for Emergency Assistance from the Vermont Department of Social Welfare (DSW). She had neither applied for nor received assistance under this program during the twelve months immediately preceeding February 5, 1975. Her immediate need was for money to pay for food, past due rent and past due utility charges for herself and her child. Her next regular ANFC check, in the amount of $42.00 was not due to arrive until February 16, 1975, and she had no source of money in the meantime to meet her basic needs.

Plaintiff Lynch's application was denied on the basis of WAM §§ 2600 and 2602 which render ineligible an applicant whose income meets or exceeds the ANFC

payment level during the thirty days immediately preceding the date of application and whose emergency need is not the consequence of one of the events specified in § 2602.

3. Gail Huntley

Plaintiff Gail Huntley lives in St. Albans, Vermont, with her two year old child. Her sole source of income is a regular ANFC grant which pays her $159 on the first and $98.00 on the sixteenth of each month, for a total of $257 per month.

On April 1, 1975, Ms. Huntley moved into a new apartment because of a failure of the old apartment's water supply. She used all but $13 of the regular ANFC check she received on April 1, 1975, to pay part of the first month's rent on the new apartment, to purchase food and to take care of several other minor necessary expenses. She then was informed by the local electric utility that a $50 deposit was required before electric service would be provided to her new apartment.

On April 2, 1975, plaintiff Huntley applied for Emergency Assistance from DSW to help pay the required deposit for electric service. She had no means with which to pay the deposit and her next regular ANFC check was not due until April 16, 1975. During the twelve months prior to April 2, 1975, plaintiff Huntley had received $17 in General Assistance which was subject to federal participation under the Emergency Assistance Program.

Plaintiff Huntley's application for Emergency Assistance was denied on the basis of WAM §§ 2600 and 2602 since the income from her regular ANFC checks exceeded the allowable level permitted by § 2600 and the cause of her financial crisis was not within the exceptions recognized by § 2602.

4. Ruthann Bigelow

Plaintiff Ruthann Bigelow, a regular ANFC recipient, resides in Huntington, Vermont, with her two children, ages 2 and 6. On July 16, 1974, Ms. Bigelow received her regular mid-month ANFC check in the amount of $134. She immediately spent $34 from the proceeds of that check to pay gas, light and phone bills. Shortly thereafter, she spent the remaining $100 for a set of bunk beds for her children. This purchase was necessitated by the removal by plaintiff's landlord of a bed he had loaned to her and by the fact that plaintiff's children had developed a skin disease the treatment of which required that they sleep in separate beds.

As a result of the extraordinary expenditure for the bunk beds, plaintiff Bigelow was without money to purchase food by July 22, 1974, and had inadequate food on hand to feed her family until receipt of her next regular ANFC check on August 1, 1974. She had no alternative source of money or food.

On July 22, 1974, Ms. Bigelow applied for Emergency Assistance from DSW. During the twelve months prior to July 22, 1974, she had received "in-kind" assistance for food under the General Assistance program with a total value of $5.76. This grant of $5.76 was claimed for federal financial participation under the Emergency Assistance program.

Plaintiff Bigelow's application for Emergency Assistance was denied on the basis of WAM § 2600 and § 2602 since the income from her regular ANFC grant exceeded the allowable level permitted by § 2600 and the cause of her financial crisis was not within the exceptions recognized by § 2602.

5. Leland Young

Plaintiff Leland Young lives in St. Johnsbury, Vermont, with his wife and three children. He is a regular recipient of ANFC in the amount of $401 per month. On September 26, 1975, his refrigerator broke down beyond repair. Mr. Young did not have funds available at that time to purchase a replacement refrigerator since he needed his ANFC grants for on-going expenses and was unable to obtain a commercial loan.

Mr. Young applied for an Emergency Assistance grant for a refrigerator on September 30, 1975.

That application was denied on the basis of WAM §§ 2600 and 2602 since the income from his ANFC grant exceeded the allowable level permitted by § 2600 and the cause of his emergency need was not within the exceptions recognized by § 2602.

III. ARGUMENT

A. The District Court Properly Assumed Jurisdiction Over This Action

Plaintiffs brought this civil rights action pursuant to 42 U.S.C. § 1983 seeking relief from a deprivation of rights secured by the Constitution and laws of the United States. Jurisdiction was founded on 28 U.S.C. § 1343(3) which provides original jurisdiction in the district courts to redress deprivations under color of state law or regulation of any right, privilege or immunity secured by the Constitution.

The Complaint alleges that the Vermont state plan for ANFC-EA denies plaintiffs equal protection of the laws by denying them emergency benefits simply because their emergency situations did not arise from one of the causes specified in WAM §2602. The Complaint further alleges that Vermont's ANFC-EA regulations create a

conclusive presumption that an emergency need caused by an event other than those specified in WAM § 2602 occurs only through the fault of the applicant and that such a conclusive presumption denies plaintiffs due process of law.

Following a procedure expressly approved by the Supreme Court, the District Court determined that plaintiffs' constitutional claims were sufficiently substantial to vest it of jurisdiction under 28 U.S.C. § 1343(3) and proceeded to dispose of the case solely on the pendent statutory claim. Hagans v. Lavine, 415 U.S. 528, 536, 543 (1974); Rosado v. Wyman, 397 U.S. 397, 402-05 (1970).

In Hagans, the Supreme Court reviewed the standards governing the assumption of jurisdiction by the federal courts in actions which are jurisdictionally based on 28 U.S.C. § 1343(3). As in the instant case, plaintiffs in Hagans alleged that a state welfare regulation violated the Equal Protection Clause of the Constitution and contravened pertinent provisions of the Social Security Act and regulations issued pursuant thereto. 415 U.S. at 531.

The Court concluded that the District Court could assume jurisdiction over both the statutory and constitutional claims under 28 U.S.C. § 1343(3) if the consti-

tutional claim was of "sufficient substance to support federal jurisdiction." Id. at 536. The showing which a plaintiff must make under this test is in fact relatively slight, since jurisdiction will attach unless the constitutional claim is "obviously frivolous", "wholly insubstantial" or "absolutely devoid of merit". Id. at 537. Under the standards enunciated in Hagans, a claim will be considered insubstantial only if "'its unsoundness so clearly results from the previous decisions of this [Supreme] court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy'". Id. at 538.

Application of this standard to the constitutional claims presented herein leaves no doubt that they are more than adequate to support jurisdiction. Although the Supreme Court has not passed upon the constitutional issues raised in this case, a number of lower federal courts have found state Emergency Assistance regulations similar to those in Vermont to be sufficiently constitutionally suspect to sustain federal jurisdiction under § 1343(3).

Indeed, in Burrell v. Norton, 381 F. Supp. 339 (D. Conn. 1974) the District Court ruled that a

Connecticut welfare regulation which limited Emergency Assistance payments to victims of certain types of crises constituted a denial of equal protection. In Williams v. Wohlgemuth, 400 F. Supp. 1309, 1312-13 (E.D. Pa. 1975), aff'd, ___ F.2d___, No. 75-2239 (3d Cir. July 20, 1976) (Slip Opinion attached hereto) both the District Court and the Court of Appeals expressly found plaintiffs' constitutional challenge to a Pennsylvania regulation which limited Emergency Assistance to victims of civil disorder or natural disaster sufficiently substantial to sustain federal jurisdiction. A similar result was reached by the Court of Appeals in Mandley v. Trainor, 523 F.2d 415, 419 n.2 (7th Cir. 1975)..

Dandridge v. Williams, 397 U.S. 471 (1970), relied on by defendant, does not defeat jurisdiction in this case. As Hagans v. Lavine makes clear, Dandridge in no way lowered the requirement that legislation must not invidiously discriminate among individuals. 415 U.S. at 539. More importantly, Hagans reiterated earlier opinions that a plaintiff is not obligated to prove his constitutional claim before jurisdiction attaches. Defendant's argument that Vermont's ANFC-EA regulations do not in fact deny plaintiffs equal protection of the

laws should be reserved for the merits of this case and is not the proper test for determining the threshhold question of jurisdiction. See Bell v. Hood, 327 U. S. 678 (1946), quoted in Hagans, supra, at 542.

Previous decisions by the federal courts demonstrate that regulations which afford of deny Emergency Assistance to equally destitute persons based on the cause of destitution are not so patently rational "as to require no meaningful consideration." Id. at 540-41. See also p. 18 infra. Under these circumstances, the District Court properly assumed jurisdiction of this action.

B. Vermont's ANFC-EA Regulations Violate Plaintiffs' Rights to Equal Protection of the Laws

Although the Supreme Court held in Dandridge v. Williams, 397 U.S. 471 (1970), that challenges to state welfare laws under the Fourteenth Amendment are to be measured against traditional concepts of equal protection, Dandridge "evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law. State laws and regulations must still 'be rationally based and free from invidious discrimination'". Hagans v. Lavine, 415 U.S. at 539.

At a minimum, a law which treats equally situated persons differently must rest upon criteria which bear a substantial relation to the purpose and object of the legislation. Reed v. Reed, 404 U.S. 71, 75-76 (1971); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973).

The express purpose of the legislation providing emergency assistance to needy families with children is to "avoid destitution" or to "provide living arrangements in a home" for a needy child under the age of 21 who is without resources. 42 U.S.C. § 606(e)(1); 45 C.F.R. § 233.120; Mandley v. Trainor, 523 F.2d at 420; Williams v. Wohlgemuth, ____F.2d____, Slip Opinion at 2. The only limitation placed on the availability of Emergency Assistance is that it be provided for a period not in excess of 30 days in a 12 month period and that the destitution or need for living arrangements not be the result of a refusal without good cause by the child or caretaking relative to accept employment. 42 U.S.C. § 606(e)(1).

Under Vermont's ANFC-EA regulations, the only ANFC recipients who can receive Emergency Assistance are those who have emergency needs as a consequence of one of the four "catastrophic situations" listed in

WAM § 2602. As a result, equally destitute children are treated differently based upon the cause of their destitution.

Thus, had plaintiff Lynch lost her money as a result of a natural disaster instead of a theft, she would have been eligible for assistance. Similarly, had plaintiff Huntley been forced to move because of a court ordered eviction instead of a defunct water system, her application for ANFC-EA would have been granted. And had plaintiff Bigelow's childrens' bed been destroyed by fire instead of repossessed by her landlord, she too could have received Emergency Assistance.

The arbitrariness of the classifications created by § 2602 is obvious on their face. The regulation not only fails to bear a fair and substantial relation to the objectives of the federal Act but is, in fact, directly inconsistent with the statutory goals of avoiding destitution and providing living arrangements for needy children. See Mandley v. Trainor, supra; Williams v. Wohlgemuth, supra.

Defendant attempts to rationalize WAM § 2602 on the theory that the regulation encourages careful management of applicants' homes by denying an exception in those cases where the emergency need is caused by

a problem within an applicant's control. Defendant further claims that the regulation "has the effect" of minimizing the number of fraudulent claims by applicants (defendant's brief at 10-11).

It may first be observed that these goals bear not the slightest relation to the purposes of the Emergency Assistance program. Defendant makes no attempt to show such a relationship and plaintiff submits that none may be found in the Act or its legislative history. Moreover, apart from the bald conclusion contained in defendant's brief, the State has offered no evidence that the asserted reasons for the distinctions contained in § 2602 have "some basis in practical experience." South Carolina v. Katzenbach 383 U.S. 301, 331 (1966); Townsend v. Swank, 404 U.S. at 291.

The most cursory review of plaintiffs' circumstances in this case reveals the hollowness of defendant's "careful management" rationale. The causes of destitution for which assistance is allowed are no more or less within the control of the victims than those for which assistance is denied. A poor person has no more control over when the water system will give out or when a thief will strike than she does over when a natural disaster or fire will occur.

Nor are the challenged classifications a rational means of preventing spurious claims for assistance. A fire can be "staged" or the issuance of a writ of possession "arranged" as easily as a sham theft or repossession. Moreover, Vermont law contains independent provisions to deal with issues of welfare fraud. 33 V.S.A. §§ 2581 et seq. It is therefore unlikely that § 2602 was ever intended to deal with this same problem. See United States Dept. of Agriculture v. Moreno, 413 U.S. at 536-37.

Baxter v. Minter, 378 F. Supp. 1213 (D. Mass. 1974), relied upon by defendant, is wholly inapposite to the instant case. The Massachusetts Emergency Assistance program reviewed in Baxter did not limit eligibility to certain types of crises. Any AFDC recipient who met federal Emergency Assistance standards was eligible for assistance.

The only case known to plaintiffs and decided on constitutional grounds which is similar on the facts to the instant case is Burrell v. Norton, 381 F. Supp. 339 (D. Conn. 1974). There the District Court struck down on equal protection grounds state welfare regulations which limited Emergency Assistance to situations involving "a natural disaster of a fire or flood over

which the recipient has no control...." The plaintiff in Burrell was hospitalized when most of her furniture, furnishings and clothing were stolen from her apartment. Her application for Emergency Assistance was denied because of the natural disaster limitation in the state regulations. The court found that the challenged regulation:

> by its exclusion from emergency assistance of otherwise needy welfare recipients solely because their dire circumstances are not the result of 'a natural disaster of a fire or flood,' fails to 'rationally (further) some legitimate, articulated state interest.' McGinnis v. Royster, 410 U.S. 263, 270 (1973), and therefore violates the Equal Protection Clause of the Fourteenth Amendment. Id. at 344.

The Burrell court acknowledged the limitations placed on the protection afforded by the equal protection clause in Dandridge v. Williams, supra, but observed that "welfare officials, like other state officers, may not establish classifications which are without basis in reason." 381 F. Supp. at 343. As was the case with the regulations at issue in Burrell, the rules which have resulted in plaintiffs' exclusion from Emergency Assistance when they were clearly in need are without basis in reason and thereby violate plaintiffs' rights to equal protection of the laws.

C. Vermont's ANFC-EA Regulations Are in Conflict With the Social Security Act and Are Thereby Invalid Under the Supremacy Clause of the United States Constitution

1. Introduction

The Supreme Court has taken the position that states which choose to participate in the AFDC program and any of its component parts must adhere to the standards for client eligibility contained in the Social Security Act. State statutes and regulations which have attempted to narrow the eligibility requirements set forth in the Act have been consistently struck down as violative of the Supremacy Clause of the Constitution. See e.g., Philbrook v. Glodgett, 421 U.S. 707, 719 (1975); Carleson v. Remillard, 406 U.S. 598 (1972); Townsend v. Swank, 404 U.S. at 285; King v. Smith, 392 U.S. at 333. The judicial task in each of these cases has been to "ascertain the congressional intent and give effect to the legislative will". Philbrook v. Glodgett, supra, at 713.

The decision in Townsend v. Swank, supra, exemplifies the approach taken by the Court in these cases. In Townsend, the Court reviewed an Illinois welfare

regulation which provided AFDC benefits to 18-20 year old children who were attending high school or vocational training but which denied assistance to children of that age group who were attending a college or university.

Plaintiffs claimed that the regulation violated the equal protection clause and was inconsistent with the definition of "dependent child" contained in section 406(a)(2)(B), 42 U.S.C. § 606(a)(2)(B) of the Social Security Act. That section defines dependent child to include a child "under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment."

Illinois argued that the Act authorized states to vary eligibility requirements from federal standards and thereby discriminate between needy children solely on the type of school they attend. Id. at 287.

Relying on King v. Smith, supra, the Court enunciated the standard for review of state regulations which vary eligibility requirements from those contained

in the Social Security Act:

> [A]t least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. 404 U.S. at 286.

Finding no support for the State's argument in the legislative history of the section authorizing aid to students, the Court concluded that the Illinois regulation was in conflict with the definition of "dependent child" contained in the Act and therefore invalid under the Supremacy Clause. Any doubt in the legislative interpretation was to be resolved in favor of eligibility in order to avoid the necessity of passing on the constitutional issue. Id. at 291.

Defendant herein does not challenge the application of the principles of King v. Smith and Townsend to the instant case. Rather, defendant asserts that Vermont's ANFC-EA regulations are consistent with the Social Security Act, 42 U.S.C. § 606(e) (defendant's brief at 18).

Although WAM §§ 2600 and 2602 are inextricably bound together, defendant urges a bifurcated review of those rules. Whether viewed together or in part,

however, these regulations are in direct conflict with § 606(e).

2. WAM § 2600

Both the Social Security Act and the legislative history of § 606(e) make it clear that the Emergency Assistance component of AFDC was intended "at the least", to provide benefits to AFDC recipients during times of crisis. Williams v. Wohlgemuth, supra, at 8. Section 606(e) is located within the AFDC definitions section of the Social Security Act. The section requires that a caretaker relative be one of those listed in the definition of "dependent child", 42 U.S.C. § 606(a)(1). The section expressly provides for Emergency Assistance to "needy families with children". As noted by the Court of Appeals in Williams v. Wohlgemuth, supra, at 7, that phrase is a critical one since it is also used in the section of the Act which sets forth the requirements for state plans for AFDC. 42 U.S. § 602.

Finally, the legislative history of the Emergency Assistance amendments reveals that while Congress may

have intended broader coverage for the program than simply AFDC recipients, those recipients were certainly included within the purview of the Act. See S. Rep. No. 744, 90th Cong., 1st Sess. 1967 Cong. and Admin. News 3002-3003.

A number of federal courts have been called upon to analyze the relationship between AFDC generally and its Emergency Assistance component. Each has concluded that the relationship is a close one and that Congress intended that AFDC recipients be eligible to receive AFDC-EA when faced with crisis situations. Williams v. Wohlgemuth, supra, at 7-8; Mandley v. Trainor, 523 F.2d at 422; Baxter v. Minter, 378 F. Supp. 1213, 1218-20 (D. Mass. 1974).

WAM § 2600, standing alone, automatically forecloses Emergency Assistance to the principal group that Congress intended to protect in the AFDC-EA program. Defendant nevertheless attempts to characterize § 2600 as a "standard of need" which permissibly measures "need" and "destitution" for purposes of eligibility (defendant's brief at 18-20). See, e.g., Jefferson v. Hackney, 406 U.S. 535 (1972). But no decision of the Supreme Court has ever held that a State may establish a "standard of need" which categorically excludes the

class of persons which Congress intended to protect. The 30 day rule does not simply draw a line of poverty, cf. Baxter v. Minter, 378 F. Supp. at 1217, but rather operates as a categorical eligibility standard which drastically restricts the class of children made eligible by Congress. As such, the 30 day rule must be considered invalid under the Supremacy Clause. Townsend v. Swank, supra; King v. Smith, supra.

Apart from its automatic exclusion of ANFC recipients, the practical operation of the 30 day financial review contained in § 2600 is in direct conflict with the legislative purpose of the Emergency Assistance program. The Emergency Assistance program, as its name implies, was designed to provide financial relief to needy children who are faced with a sudden emergency or an unusual crisis. It is admittedly not designed to remedy the "'anticipated demands...of everyday life'", Hagans v. Berger, 536 F.2d, 537 (2d Cir. 1976), but it clearly is designed to provide relief in cases of sudden emergency. Id. Thus, the Senate Report on the AFDC-EA legislation states:

> The committee understands that the process of determing AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the

> event of eviction, or when utilities are turned off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today. When a child is suddenly deprived of his parents by their accidental death or when the agency finds that conditions in home are contrary to the child's welfare, new arrangements and court referrals may have to be made. S. Rep. No. 744, 90th Cong., 1st Sess. 1967 Cong. & Admin. News. 2834, 3002.

See also 45 C.F.R.§§ 233.120(a)(4); (b)(1)(ii); (b)(2)(iii); Baxter v. Minter, 378 F. Supp. at 1219, n. 11 and accompanying text.

Though defendant claims it is a measure of need and destitution in the ANFC-EA program, the 30 day rule is not, in fact, a reasonable indicator of financial need caused by an emergency situation. Section 2600 requires a financial review for a period of 30 days prior to the date of application for assistance. That review may (and often will) include a substantial period which pre-dates the emergency.[3/]

3/ All of the plaintiffs in this action applied for emergency assistance within a few days of their individual emergencies. See pages 9 to 14, supra. It may fairly be assumed that other ANFC-EA applicants will also seek assistance immediately following a crisis situation.

By determining eligibility on the basis of a client's pre-crisis financial status, the 30 day rule fails to measure emergency needs and thereby directly frustrates the Congressional purpose behind § 606(e).[4/]

3. WAM § 2602

An ANFC recipient may receive Emergency Assistance in Vermont only if his or her need arises from one of the situations designated in WAM § 2602. See Appendix at 57. Defendant justifies these restrictions on eligibility on the basis of 45 C.F.R. § 233.120(a)(1) which provides, in part, that a state plan must "[s]pecify the eligibility conditions imposed for the recipient of emergency assistance." But it is not uncommon for HEW to impermissibly grant states latitude in the AFDC program when Congress intended otherwise. King v. Smith, 392 U.S. at 333 n. 34; Townsend v. Swank, 404 U.S at 286; Carleson v. Remillard, 406 U.S. at 602; Mandley v. Trainor, 523 F.2d at 422.

4/ It must be recalled that § 2600 is principally an eligibility standard for General Assistance. As such, it was undoubtedly designed as a general measure of poverty rather than a standard of need for the occasional financial crisis.

Moreover, it is clear for the purposes of AFDC-EA, that a "state's definition of an emergency may not be more restrictive than that provided by the Act..." Hagans v. Berger, 536 F.2d at 532.

Section 606(e) of the Act contains numerous, highly specific eligibility requirements. In light of these requirements and the holdings in Mandley v. Trainor, supra, and Hagans, supra, it is rather difficult to accept defendant's view that the states maintain complete discretion on how to administer the ANFC-EA program (defendant's brief at 23). In fact, the Act leaves no discretion to the states respecting the types of individuals who are eligible to receive Emergency Assistance. In particular, the Act gives no authority to the states to limit assistance to certain types of crises.

By contrast, when Congress chose to place discretion in the hands of the states, it said so in unmistakable terms. Thus, the Act expressly provides that states are free to decide: 1) the type and amount of emergency aid and services that are to be provided, § 606(e)(1)(A);

2) the length of time (up to 30 days) for which assistance will be provided, § 606(e)(1); and 3) whether or not to provide assistance to migrant workers, § 606(e)(2).

This construction of the Emergency Assistance legislation clearly indicates that Congress did not intend the states to exercise discretion in matters of client eligibility. Mandley v. Trainor, 523 F.2d at 420-21; Williams v. Wohlgemuth, supra at 10-11. This view is supported by the Act's legislative history. As the Senate Report quoted on pages 29-30, supra, indicates, "Congress was concerned with needy children who were approaching destitution from a variety of causes...." Mandley v. Trainor, supra at 421. See also, Williams v. Wohlgemuth, supra at 11. In both Mandley and Williams, the Courts concluded that a state regulation which narrowed the federal standard for AFDC-EA eligibility by limiting assistance to victims of certain types of crises violated the Social Security Act and was therefore invalid under the Supremacy Clause.

In light of the express provisions of § 606(e) and the section's legislative history, plaintiffs urge that 45 C.F.R. § 233.120(a)(1) not be relied upon. See Mandley v. Trainor, 523 F. Supp. at 422. Of greater relevance to this case is 45 C.F.R. § 233.10(a)(1)(ii)

which applies to § 606(e), and provides that:

> (ii) A state may
>
> (A) provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage.

See Mandley, supra at 421; Williams, supra at 12.

It is submitted that Vermont's ANFC-EA program imposes eligibility requirements which are not authorized by or consistent with the Social Security Act and which are therefore invalid under the Supremacy Clause of the Constitution.

IV. CONCLUSION

In light of the above arguments, appellees respectfully request the Court to affirm the decision below.

Respectfully submitted,

September 29, 1976

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A P P E N D I X

Williams v. Wohlgemuth, ____F.2d____ No. 75-
(3d Cir., July 20, 1976)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2239

VIOLA WILLIAMS, and PHILADELPHIA WELFARE RIGHTS ORGANIZATION, by Louise Brookins, its Chairwoman and Trustee ad litem, for themselves and all others similarly situated

v.

HELENE WOHLGEMUTH, Secretary, Department of Public Welfare; DON JOSE STOVALL, Executive Director, Philadelphia County Board of Assistance; and GERALDINE MARREN, District Supervisor, Philadelphia County Board of Assistance,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 74-3162

Argued May 26, 1976

Before: ADAMS and HUNTER, *Circuit Judges*, and SCHWARTZ, *District Judge*

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OPINION OF THE COURT

(Filed July 20, 1976)

ADAMS, *Circuit Judge.*

We are asked in this appeal to determine the validity of certain regulations of the Pennsylvania Department of Public Welfare (DPW). The regulations in question make emergency assistance payments available to persons whose special needs for such funding result from either of two enumerated causes—civil disorder or natural disaster—but not from any others.

A.

Congress amended the Social Security Act in 1968 by authorizing the states to provide emergency assistance payments to needy families with children.[1] The legislation permitted the states to deliver money, payments in kind, medical care, or services to needy families with children in order "to avoid destitution of such child or to provide living arrangements in a home for such child. . . ."[2] Adoption of an emergency assistance plan by a state is optional,[3] but fifty percent of the total amount expended by a state that chooses to utilize the program is reimbursed by the federal government.[4]

The Commonwealth of Pennsylvania elected to initiate an emergency assistance program in 1969. Its plan made the assistance available only to those needy families whose destitution was caused by civil disorder.[5] Three years

1. Act of Jan. 2, 1968, Pub. L. No. 90-248, §§ 206(a), 206(b), 81 Stat. 893 (codified in Social Security Act §§ 403(a)(5), 406(e), 42 U.S.C. §§ 603 (a)(5), 606(e) (1970)). Although finally enacted early in 1968, the amendments are known as the Social Security Amendments of 1967. 81 Stat. 821.

2. Social Security Act § 406(e)(1), 42 U.S.C. § 606(e)(1) (1970).

3. Thus, § 402(a) of the Act, 42 U.S.C. § 602(a) (1970), which lists the items that *must* be included in a state plan, does not include any reference to the emergency assistance program. However, if a state chooses to implement the program, its state plan, *see id.*, must "include provision for such assistance." *Id.* § 406(e)(1), 42 U.S.C. § 606(e)(1) (1970).

4. *Id.* § 403(a)(5), 42 U.S.C. § 603(a)(5) (1970).

5. Pennsylvania Department of Public Welfare, Pennsylvania Manual § 6170, appendix III.

later, the arrangement was amended to allow assistance for emergency needs caused by natural disaster as well.[6]

On December 11, 1974 Viola Williams and the Philadelphia Welfare Rights Organization filed a class action suit against the Secretary of DPW and officials of the Philadelphia County Board of Assistance, challenging the validity of Pennsylvania's emergency assistance plan. The gravamen of the complaint was that if a state chooses to provide any emergency assistance payments, it must make them available to all families with children facing destitution, regardless of the cause of the emergency. Specifically, it was alleged that Williams could not afford to pay her electric bill; that she and her child were in an emergency situation because the electrical service to her home had been terminated; and that DPW refused to provide emergency assistance payments to her, since her emergency was not caused by civil disorder or natural disaster. The complaint further alleged that the named plaintiffs represented a class composed of "all Pennsylvania recipients of public assistance who are denied a prompt emergency assistance grant." It was urged that the Pennsylvania plan violated the Social Security Act and the equal protection and due process clauses of the Constitution.

Six days after the complaint was filed, Williams received from DPW a lump sum payment sufficient to pay her past-due electric bill. It came after a check of her records by the Department and the resultant discovery that errors had been committed on payments previously made to her. The new payment solved her exigent needs. Presumably because Williams was therefore no longer able to represent the class, a motion to intervene as plaintiffs was filed two days later on behalf of four other individuals. Three of them—Mary Witt, Beatrice Carmona, and Esther Saez—averred that they had received notices of eviction from their landlords, and could not find other housing because they

6. Pennsylvania Department of Public Welfare, Public Assistance Memorandum No. 1209.

could not afford the security deposit. Carmona and Saez further stated in affidavits supporting the motion to intervene that their public assistance caseworkers had told them that DPW would not provide assistance to cover the deposit or any advance rental payments that might be required. The fourth individual, Geraldine Little, claimed that she had an outstanding water bill that she could not pay, and that she was faced with termination of her water service.

The district court held a hearing on December 20, the day after the motion to intervene had been filed. After the hearing, that court took under advisement the motion to intervene, the question of class action certification, and the merits of the case.[7] In a memorandum opinion and order dated August 22, 1975, the district court granted the motion to intervene, certified the proposed class, and held that the Pennsylvania emergency assistance plan conflicts with the applicable federal statute and the regulations promulgated under it. The defendants took an appeal.

We affirm.

B.

As a preliminary matter, we must address two contentions raised by the defendants which, if correct, would require reversal of the judgment of the district court without the necessity of reaching the merits.

First, the defendants urge that the district court did not have jurisdiction over the subject matter. This contention is not meritorious.

The complaint alleged that Pennsylvania's emergency assistance program violated 42 U.S.C. § 1983 by depriving the plaintiffs of the equal protection of the laws and of due process of law. A pendent "statutory" claim that the Pennsylvania plan conflicts with the Social Security Act, and thus is in violation of the supremacy clause,[8] was also

7. Although the complaint included a constitutional challenge to a state regulation and sought injunctive relief, which by itself would require the convening of a district court of three judges, *see* 28 U.S.C. § 2281 (1970), the single district judge properly addressed the pendent supremacy clause claim. Hagans v. Lavine, 415 U.S. 528, 543-45 (1974).

8. *See* Swift & Co. v. Wickham, 382 U.S. 111 (1965).

included. The complaint further asserted that the district court had jurisdiction under 28 U.S.C. § 1343(3), which provides the federal courts with power to adjudicate civil actions instituted to "redress the deprivation, under color of any state . . . regulation, . . . of any right . . . secured by the Constitution. . . ."

In *Hagans v. Lavine*,[9] the Supreme Court upheld the decision of a district court to take jurisdiction in a similarly structured suit, one also attacking a state's welfare program. The Court ruled in *Hagans* that the district court had jurisdiction over the case if "the constitutional claim . . . was of sufficient substance to support federal jurisdiction."[10] A claim is sufficient to confer such jurisdiction, the Court stated, if it is not "wholly insubstantial" or "wholly frivolous."[11]

Even "[i]n the area of economics and social welfare,"[12] "[s]tate laws and regulations must still 'be rationally based and free from invidious discrimination.'"[13] We cannot say that the emergency assistance plan adopted by Pennsylvania is so unquestionably rational that the constitutional challenge is wholly insubstantial.[14] Thus, the district court properly took jurisdiction over the case.

Second, it is contended by the defendants that there was no plaintiff with standing to sue as an individual or on behalf of the class at the time the district court certified the class and decided the case.

The power of federal courts to adjudicate disputes is limited by article III of the Constitution to actual cases

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9. 415 U.S. 528 (1974).

10. *Id.* at 536. *See also* Burns v. Alcala, 420 U.S. 575, 577 n.1 (1975).

11. 415 U.S. at 537.

12. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

13. Hagans v. Lavine, 415 U.S. 528, 539 (1974) (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)).

14. In fact, one court has invalidated a similar state program on constitutional grounds. Burrell v. Norton, 381 F. Supp. 339 (D. Conn. 1974).

The defendants also argued in their brief that jurisdiction over this case was not conferred by 28 U.S.C. § 1331. In view of our conclusion that jurisdiction exists under § 1343(3), we need not address that point.

and controversies. For our purposes here, this requirement means, in the words of the Supreme Court in *Sosna v. Iowa*,[15] that "[t]here must . . . be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, [and that] there must be a live controversy at the time this Court reviews the case."[16]

We must, then, determine whether the present case complied with the three branches of the *Sosna* standard. We find that it did.

(1) When the complaint was filed, plaintiff Williams alleged that DPW had improperly refused to issue her an emergency assistance check. There was thus a controversy between at least one plaintiff and the defendants at that time.

(2) When the district court certified the class action, the motion of four other individuals to intervene as plaintiffs was simultaneously granted. Each of them had made the same claim that Williams had—that DPW had improperly refused to pay emergency assistance. In the district court's memorandum opinion, it was observed that "some" of the claims of the intervenors had been remedied by aid received from other sources. We understand that statement to mean that some had not. But the district court made clear that the intervenors were entitled to litigate the interests of the class because the issue presented was "capable of repetition, yet evading review." Under these circumstances, the class has standing only if the certification of the class is found to "relate back" to the filing of the original complaint.[17] Although the trial judge might have certified the class earlier in the proceedings, the emergency nature of the claims is such that they might

15. 419 U.S. 393 (1975).
16. *Id.* at 402 (footnotes omitted).
17. *Id.* n.11.

well have been moot prior to certification. Accordingly, application of the relation-back doctrine is proper here. Thus, not only was there a controversy between at least one plaintiff and the defendants at the time the class action was certified, but the certification of the class also related back to the time of the complaint.

(3) Nothing has been brought to our attention that would indicate that there is no longer any controversy between members of the plaintiff class and the defendants.[18]

Because the *Sosna* test was met in the case before us, we conclude that there was at least one plaintiff with standing when the complaint was filed and when the class was certified, and that we may review the case in its present posture. We thus move to the merits.

C.

The defendants make two claims concerning the merits: that Congress did not intend that emergency assistance be made available to recipients of aid to families with dependent children (AFDC), and that the Commonwealth may, in any event, choose to provide emergency assistance to victims of certain emergency situations but not of others. We decline to adopt either contention.

Our understanding of the statutory scheme established by Congress when it created the emergency assistance program leads us to the conclusion that AFDC recipients are eligible to receive emergency assistance payments. There are two independent bases for this result. First, the two statutory subsections establishing the emergency assistance program denominate it "emergency assistance to needy

18. In view of our conclusions regarding the individuals who were permitted to intervene as plaintiffs, we need not decide whether a controversy may exist, in the circumstances here, between the defendants and the institutional plaintiff, the Philadelphia Welfare Rights Organization. *See* National League of Cities v. Usery, 44 U.S.L.W. 4974, 4974-75 n.7 (U.S. June 24, 1976); California Bankers Ass'n v. Shultz, 416 U.S. 21, 44-45 (1974); *cf.* United States v. SCRAP, 412 U.S. 669, 683-90 (1973); Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

families with children."[19] The phrase "needy families with children" is a critical one, since in another section of the Act, that same phrase describes which families are eligible to receive AFDC payments at all.[20] It is unlikely that Congress would have used the same words in creating the emergency assistance program if it had not intended that emergency assistance be available, at the least, to those families currently receiving AFDC payments.

The conclusion derived from the particular language used in the statute is reinforced by the legislative history, scanty as it might be. The most telling portion of that history is an observation contained in the Report prepared by the Senate Finance Committee. Families eligible to receive emergency assistance, the authors of the Report wrote, "do not have to be receiving, or eligible upon application to receive, AFDC . . . ."[21] The inference is that families may receive AFDC without losing their eligibility for emergency assistance payments.[22]

Finally, we proceed to the issue that lies at the core of this litigation: whether, consistently with the Act, Pennsylvania may limit emergency assistance payments to victims of two specific kinds of emergencies—those caused by civil disorder or natural disaster—and exclude from eligibility persons whose emergency situations arise from any other cause. The plaintiffs argue that the eligibility criteria contained in section 406(e) of the Social Security Act must be used by each state that adopts an emergency

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19. Social Security Act §§ 403(a)(5), 406(e)(1), 42 U.S.C. §§ 603(a)(5), 606(e)(1) (1970).

20. Thus, § 402(a) of the Act, 42 U.S.C. § 602(a) (1970), describes at great length the items that must be included in a state plan for providing "aid and services to needy families with children. . . ."

21. S. Rep. No. 744, 90th Cong., 1st Sess. (1967) (reprinted in 1967 U.S. Code Cong. & Admin. News 2834, 3003).

22. Our conclusion in this regard is buttressed by the fact that Pennsylvania's current plan provides that emergency assistance payments shall be made to current recipients of public assistance, to persons eligible for, but not receiving, public assistance, and to persons not eligible for public assistance. Pennsylvania Department of Public Welfare, Pennsylvania Manual § 6170, appendix III, at 2. In its brief filed in this Court, the Commonwealth stated that it "provides emergency assistance both to AFDC and non-AFDC families in times of civil disorder and natural disaster." Appellant's brief at 59.

assistance program. In establishing narrower eligibility standards by restricting the assistance payments to emergencies caused by two specific types of occurrences only, the plaintiffs maintain, Pennsylvania has failed to implement the kind of program that Congress insisted that the states adopt if they are to receive federal financial aid. The defendants disagree, asserting that section 406(e) simply defines the outer boundaries of that set of families who may receive emergency assistance under a state plan. A narrower eligibility standard may be adopted if the state so chooses, continues the argument, and that is what Pennsylvania has done.

Agreeing with the contention of the plaintiffs, the district court placed great reliance upon the decisions of the Supreme Court in *Townsend v. Swank*[23] and its progeny,[24] where it has repeatedly been held that the states may not exclude from eligibility for AFDC payments any persons who are eligible under the standards established in the Social Security Act. In this Court, plaintiffs also argue that that line of cases controls in the emergency assistance field.

In each of those cases, the holding was bottomed upon the mandatory language in section 402(a)(10) of the Social Security Act.[25] That section requires that "aid to families with dependent children"—the AFDC payments defined in section 406(b) of the Act[26]—be paid "to all eligible individuals . . . ."[27] But there is no parallel requirement in

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23. 404 U.S. 282 (1971).

24. Philbrook v. Glodgett, 421 U.S. 707 (1975); Van Lare v. Hurley, 421 U.S. 338 (1975); Burns v. Alcala, 420 U.S. 575 (1975); Shea v. Vialpando, 416 U.S. 251 (1974); Carleson v. Remillard, 406 U.S. 598 (1972). The holding in *Townsend* was grounded in King v. Smith, 392 U.S. 309 (1968).

25. 42 U.S.C. § 602(a)(10) (Supp. IV, 1974).

26. 42 U.S.C. § 606(b) (1970).

27. The reliance placed upon § 402(a)(10) in the Supreme Court decisions was expressly recognized most recently in Burns v. Alcala, 420 U.S. 575, 578 (1975). *See also* New York Dep't of Social Services v. Dublino, 413 U.S. 405, 421 (1973) (stating that in *King* and *Townsend*, "it was clear that state law excluded people from AFDC benefits who the Social Security Act expressly provided would be eligible."); Doe v. Beal, 523 F.2d 611, 615 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3287 (U.S. Oct. 10, 1975) (No. 75-554); Murrow v. Clifford, 502 F.2d 1066, 1068 n.2 (3d Cir. 1974).

the statute that emergency assistance—whose definition and funding provisions are entirely separate from those of AFDC [28]—be paid to all eligible individuals. We therefore may not conclude that *Townsend* and the cases following it, by themselves, require a holding that Pennsylvania must provide emergency assistance to all persons facing an emergency, regardless of its cause. Such a broad-based eligibility standard does not appear to have been imposed upon the states expressly by the statutory amendments creating the emergency assistance program.

Nonetheless, we understand the language employed by Congress in enacting the emergency assistance program to mean that Congress did not intend to give the states the right to limit the eligibility standard. The emergency assistance sections of the Social Security Act specifically preserve three areas of discretion for the states: the amount of time during which the aid will be available, the kinds of aid to provide, and whether to include in the program migrant workers with families.[29] Congress thus made it clear that it wanted certain aspects of the emergency assistance program left in the hands of the states. But Congress set forth in the legislation no such express authorization giving the states the power to create a limitation on which emergencies shall trigger the right to receive emergency assistance. The absence of such authorization, coupled with its presence elsewhere in the same section of the Act, indicates that Congress intended that the states

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28. *Compare* Social Security Act §§ 403(a)(5), 406(e), 42 U.S.C. §§ 603(a)(5), 606(e) (1970) (emergency assistance), *with id.* §§ 403(a)(1, 2), 406(b), 42 U.S.C. §§ 603(a)(1, 2), 606(b) (1970) (AFDC).

29. The states were given the right to choose to furnish the assistance for any period "not in excess of 30 days in any 12-month period. . . ." Congress also allowed the states to determine whether to provide money, payments in kind, other payments, medical care, or other remedial care to persons in need of emergency assistance. It further gave the states the option to include or to exclude migrant workers with families from the plan; if they are included, each state has the further power to determine whether to limit that portion of the program to particular sections of the state. Social Security Act §§ 406(e)(1), 406(e)(1)(A), 406(e)(2), 42 U.S.C. §§ 606(e)(1), 606(e)(1)(A), 606(e)(2) (1970).

not be allowed to impose eligibility standards more confining than those contained in the federal statute.[30]

Further nourishment in support of this interpretation is drawn from the recent decision of the Seventh Circuit in *Mandley v. Trainor*,[31] where the Illinois emergency assistance program was invalidated on the ground of a challenge identical to that presently before us—namely, that it violated the Act because it permitted the payment of emergency assistance to deal with emergencies resulting from certain causes, but not from others. The question there, as here, was "whether Congress intended to allow the states to apply eligibility criteria that are narrower than those set out" in section 406(e) of the Act.[32] The Seventh Circuit observed that "the legislative history is not conclusive of Congress' intent, [but] it does show that there is no specific indication that congress intended the states to be able to narrow the eligibility criteria. . . ."[33]

The history further demonstrates that "Congress was much concerned with the emergency needs of all children approaching destitution," and that Congress had "great concern for those families with children who are in need of emergency aid."[34] Such concerns are consistent with an interpretation of the statute that would not allow the

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30. Guidance in this regard is given by the maxim "*inclusio unius est exclusio alterius*," which informs a court to exclude from operation those items not included in a list of elements that are given effect expressly by the statutory language. Section 406(e) "is as significant for what it omits as for what it says." Moskowitz v. Marrow, 251 N.Y. 380, 397, 167 N.E. 506, 511 (1929) (Cardozo, C.J., concurring).

Our construction of the Act also appears appropriate in view of the doctrine favoring interpretation of statutes in a fashion that avoids the necessity of reaching constitutional questions. Townsend v. Swank, 404 U.S. 282, 291 (1972). A contrary construction would require us to remand the case to the district court for a subsequent convening of a three-judge district court, 28 U.S.C. § 2281, and a resolution of the constitutional challenges posed in the complaint.

31. 523 F.2d 415 (7th Cir. 1975).

32. *Id.* at 420.

33. *Id.* at 421.

34. *Id.*

states to constrict the scope of eligibility for emergency assistance.

Further elucidation of the meaning of the Act may be gleaned from the regulations promulgated by the Department of Health, Education, and Welfare. "In interpreting [the Social Security Act], we must be mindful that 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .'"[35] The HEW regulation stipulates that a state plan that includes an emergency assistance program "may . . . [p]rovide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage . . . ."[36] As noted, neither the Act nor its legislative history authorizes more limited coverage. The regulation, therefore, would also appear to require a broader program than Pennsylvania has established.[37]

We thus conclude that the emergency assistance plan established by the Commonwealth of Pennsylvania, by confining the right to receive such assistance to those persons whose emergencies were caused by civil disorder or natural disaster, is not congruent with the Social Security Act. As such, it is invalid under the supremacy clause of the Constitution.[38]

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35. New York State Dep't of Social Services v. Dublino, 413 U.S. 405, 421 (1973) (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969), and Dandridge v. Williams, 397 U.S. 471, 481-82 (1970)).

36. 45 C.F.R. § 233.10(a)(ii)(A) (1975). *Cf.* Mandley v. Trainor, 523 F.2d 415, 421-22 (7th Cir. 1975).

37. We do not, of course, require that Pennsylvania continue to accept federal funds for an emergency assistance program. But if such funds are used, the guidelines established by Congress must be followed.

The ruling of the Court today is in no way a reflection on the advisability of the Pennsylvania arrangement. "The wisdom or fairness of the [program, we] make no attempt to vindicate. Our duty is done when we enforce the law as it is written." Techt v. Hughes, 229 N.Y. 222, 228-29, 128 N.E. 185, 186, *cert. denied*, 254 U.S. 643 (1920). *See* National League of Cities v. Usery, 44 U.S.L.W. 4974, 4988 (U.S. June 24, 1976) (Stevens, J., dissenting).

38. This does not mean that the states may not appropriately define which situations constitute emergencies and which do not. We simply hold that the states may not restrict the payment of emergency assistance to those persons whose emergencies arise out of particular causes.

The judgment of the district court will be affirmed.

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